

**In re: GERONIMO'S AND LA MICHOACANA.**

**P.Q. Docket No. 99-0055.**

**Decision and Order.**

**Filed August 6, 2001.**

**PQ - Moving, offer for re-shipment - Knowledge of intended destination - Sanctions, purpose of, to deter others.**

Respondent filed a timely request for hearing. The Administrative Law Judge (ALJ) found that Respondent knew or should have known by prior business transactions, invoices, sales tax numbers and permit numbers that the re-sale/re-shipment of imported produce (Mexican Hass Avocados) to a recipient in another state (where importation was restricted) was prohibited by Federal Regulations. The consequences of wrongful movement (re-shipment/transportation) of imported produce to a non-permitted state/agriculture region could result in serious financial damages to U.S. agriculture interests due to importation of non-native pests and disease. Sanctions may be assessed as more than nominal or actual damages in order to deter others.

James D. Holt, for Complainant.

Gabriel Villanueva, for Respondent Geronimo's.

*Decision and Order issued by James W. Hunt, Administrative Law Judge.*

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) ("Acts") by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS") on September 9, 1999.<sup>1</sup> The complaint alleges that Respondent Geronimo's Mexican Produce ("Geronimo's") violated the Acts and regulations promulgated under the Acts (7 C.F.R. §§ 301.11(b) and 319.56-2ff) on or about March 3, 1999, by moving four boxes of Mexican Hass avocados from Chicago, Illinois, to Marshalltown, Iowa. Respondent filed a timely answer on September 24, 1999. A hearing was held on April 4, 2001, in Chicago, Illinois. James D. Holt, Esq., Office of the General Counsel, U.S. Department of Agriculture ("USDA"), appeared on behalf of the Complainant. Mr. Gabriel Villanueva appeared on behalf of Respondent Geronimo's.

### **Law**

The Plant Quarantine Act, which was in force at the time of the alleged violation in 1999, provides that the Secretary of Agriculture ("Secretary") may promulgate regulations restricting the importation of fruit into the United States to prevent the introduction of injurious insects and diseases. The Secretary may assess a civil penalty not exceeding \$1,000 for each violation (7 U.S.C. §§ 160, 163). On June

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<sup>1</sup>The proceeding as to Respondent La Michoacana was terminated by the entry of a Consent Decision on March 31, 2000.

20, 2000, the Plant Protection Act (7 U.S.C. § 7701) was enacted repealing the 1912 Plant Quarantine Act and the Federal Plant Pest Act. However, section 7758(c) of the Plant Protection Act provides that “Regulations issued under the authority of a provision of law repealed by [the Plant Protection Act] shall remain in effect until such time as the Secretary issues a regulation under section 7754 [of the Plant Protection Act] that supersedes the earlier regulation.” The following regulations promulgated by the Secretary under the Plant Quarantine Act have not been superseded and are therefore applicable to this proceeding:

**Title 7--Code of Federal Regulations, Part 301--Imported Plants and Plant Parts § 301.10 (Definitions)**

*Move (moved, movement).* Shipped, offered to a common carrier for shipment, received for transportation or transported by a common carrier, or carried, transported, moved, or allowed to be moved.

**§ 301.11 (Notice of quarantine; prohibitions on the interstate movement of certain imported plants and plant parts)**

(a) In accordance with part 319 of this chapter, some plants and plant parts may only be imported into the United States subject to certain destination restrictions. That is, under part 319, some plants and plant parts may be imported into some States or areas of the United States but are prohibited from being imported into, entered into, or distributed within other States or areas, as an additional safeguard against the introduction and establishment of foreign plant pests and diseases.

(b) Under this quarantine notice, whenever any imported plant or plant part is subject to destination restrictions under part 319:

(1) The State(s) or area(s) into which the plant or plant part is allowed to be imported is quarantined with respect to that plant or plant part; and

(2) No person shall move any plant or plant part from any such quarantined State or area into or through any State or area not quarantined with respect to that plant or plant part.

**Title 7--Code of Federal Regulations, Part 319--Foreign Quarantine Notices, Sub-part--Fruit and Vegetables (Quarantine)**

**§ 319.56 (Notice of quarantine)**

(a) The fact has been determined by the Secretary of Agriculture, and notice is hereby given:

(1) That there exist in Europe, Asia, Africa, Mexico, Central America, and South America, and other foreign countries and localities, certain injurious insects, including fruit and melon flies (*Tephritidae*), new to and not heretofore widely distributed within and throughout the United States, which affect and may be carried by fruits and vegetables commercially imported into the United States or brought to the ports of the United States as ships' stores or casually by passengers or others, and

(2) That the unrestricted importation of fruits and vegetables from the countries and localities enumerated may result in the entry into the United States of injurious insects, including fruit and melon flies (*Tephritidae*).

(b) The Secretary of Agriculture, under authority conferred by the act of Congress approved August 20, 1912 (37 Stat. 315; 7 U.S.C. 151-167), does hereby declare that it is necessary, in order to prevent the introduction into the United States of certain injurious insects, including fruit and melon flies (*Tephritidae*), to forbid, except as provided in the rules and regulations supplemental hereto, the importation into the United States of fruits and vegetables from the foreign countries and localities named and from any other foreign country or locality, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables.

(c) On and after November 1, 1923, and until further notice, the importation from all foreign countries and localities into the United States of fruits and vegetables, and of plants or portions of plants used as packing material in connection with shipments of such fruits and vegetables, except as provided in the rules and regulations supplemental hereto, is prohibited:

**§ 319.56-2ff (Administrative instructions governing movement of Hass avocados from Mexico to the Northeastern United States)**

Fresh Hass variety avocados (*Persea americana*) may be imported from Mexico into the United States for distribution in the northeastern United States only under a permit. . .and only under the following conditions:

. . . .

(a) *Shipping restrictions.*

. . . .

(3) The avocados may be distributed only in the following northeastern States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

### **Findings of Fact**

1. The mailing address of Respondent Geronimo's Mexican Produce is 96 South Water Market, Chicago, Illinois 60608.
2. On March 3, 1999, Respondent Geronimo's moved four boxes of Mexican Hass avocados from Chicago, Illinois to Marshalltown, Iowa.

### **Discussion**

Geronimo Sevilla is the owner of Respondent Geronimo's Mexican Produce, 96 South Water Market, Chicago, Illinois. On February 24, 1999, Respondent legally purchased Mexican Hass avocados, an imported regulated product under 7 C.F.R. § 319.56-2ff, from Blue Island Wholesale Produce, Chicago, Illinois. On March 3, 1999, it sold four boxes of Mexican Hass avocados to La Michoacana, which is located in Marshalltown, Iowa. The avocados were then moved from Illinois to Iowa on March 3. Geronimo Sevilla stated in June 2001 that he did not know when he sold the avocados to La Michoacana, that it was located in Iowa. However, La Michoacana's owner, Angel Banuelos-Sorvia, made the statement that: "The market in Chicago knows I am from Iowa because they have my sales tax # and permit # on file. I have been doing business with Geronimo's for about 10 months." (CX 8, 9, 11, 12, 13.)

On March 20, 1999, Mike Booth, an APHIS Investigator, observed boxes of Mexican Hass avocados from Geronimo's in Alden, Iowa. (Tr. 12.) The boxes containing the avocados were clearly labeled as Mexican produce and carried the following warning: "Distribution or sale is prohibited outside of and limited to the following states: CT, DC, IL, IN, KY, MA, MD, ME, MI, NH, NJ, NY, OH, PA, RI, VA, VT, WV, and WI." (Tr. 14; CX 2.) On March 22, 1999, APHIS representatives seized the Mexican Hass avocados at La Michoacana. (Tr. 13, 16, 22; CX 3, 5.)

Gabriel Villanueva, Respondent's representative at the hearing, stated, "What has been spoken is true and we know that we're supposed to go their way. They're correct, the boxes are marked. All the boxes are marked and the states they're not supposed to go." (Tr. 43.)

While Respondent did not itself move the avocados from Illinois to Iowa, it

allowed them to be moved within the meaning of 7 C.F.R. § 301.10. In *Robert W. Watts, Jr., et al.*, 53 Agric. Dec. 1419, 1427 (1994), it was held that when a person, such as Respondent, sells a regulated product that is later moved, the seller has engaged in the first step in the movement of the product and is thus considered to have moved the regulated product. Respondent therefore violated the Act and sections 7 C.F.R. §§ 301.11(b) and 319.56-2ff of the regulations when Mexican Hass avocados were moved from Chicago, Illinois, to Marshalltown, Iowa, on March 3, 1999.

On February 5, 1997, APHIS amended the regulations governing the importation of fruits and vegetables to allow Hass avocado fruit grown in approved orchards in municipalities in Michoacana, Mexico, to be imported into certain areas of the United States, subject to certain conditions. The conditions required for the importation of Hass avocado fruit included inspection and shipping procedures, restrictions on the time of year when shipments can be imported into the United States, and restrictions on the states in which avocados can be distributed. (Tr. 36; 62 FR 5293, February 5, 1997.) Using a systems approach, APHIS established a series of measures to prevent the introduction of such destructive pests as weevils, seed moths, and fruit flies that can infest avocados and other fruits and vegetables. (Tr. 36; 60 FR 34834, July 3, 1995.) One measure limited the importation of Mexican Hass avocados into the United States from November through February. Under this measure the avocados could be distributed only in Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. Iowa was not one of the states in which the avocados could be distributed. APHIS believed that the cold climate and a lack of suitable host material during the winter months would prevent pests from becoming established. (7 C.F.R. § 319.56-2ff(a)(2).)

In the United States, Hass avocados are raised in California, Florida, and Texas. (Tr. 38.) A 1995 risk assessment estimated that if weevils were introduced and became established in only California through the importation of infested Mexican Hass avocados it would cause damage of \$123 million. (Tr. 38.) In addition to the weevil threat to the avocado crop, fruit flies can spread from avocados to citrus, with the potential damage of \$1.4 billion to just citrus crops in Florida, Georgia, Louisiana, Texas, and California. (Tr. 38.)

### **Sanction**

“[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for

achieving the congressional purpose.” *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (1991).

The success of programs to protect America’s agriculture by the prevention, control and eradication of plant pests is dependent upon the compliance of individuals such as the Respondent. Without their adherence to federal regulations concerned with the prevention of the spread of plant pests, the risk of the undetected spread of destructive plant pests is greatly increased. The imposition of sanctions in cases such as this are important to prevent spread of such pests by insuring that not only a particular respondent will not again violate Federal Regulations, but also that the sanction will deter others in similar situations.

Complainant states that the United States citrus industry is annually valued at over 2 billion dollars. Past eradication of fruit fly infestations in Florida in 1956, in Texas in the 1950's, and in California in 1975, cost more than 30 million dollars. In 1983, a Medfly pest eradication program conducted in California cost over 100 million dollars. These costs do not take into account increased consumer prices, lost exports, and other indirect costs which could total more than 10 times the direct costs. *In re Lopez*, 44 Agric. Dec. 2201 (1985). It is conceivable that just one infested Mexican Hass avocado could devastate domestic avocados and other fruits and vegetables.

Complainant believes that compliance and deterrence can be achieved only with the imposition of a civil penalty of four thousand dollars. Complainant’s recommendation “as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry.” *In re S.S. Farms Linn County, Inc., et al.*, 50 Agric. Dec. 476 (1991). It is found that a civil penalty of four thousand dollars (\$4,000.00) is an appropriate sanction in this case.

### **Conclusion of Law**

Respondent Geronimo’s Mexican Produce violated the Plant Quarantine Act (7 U.S.C. § 151), the Federal Plant Pest Act (7 U.S.C. § 150aa) and the regulations promulgated thereunder by moving Mexican Hass avocados to a state where they are prohibited.

### **Order**

Respondent Geronimo’s is assessed a civil penalty of four thousand dollars (\$4,000.00). Respondent shall send a certified check or money order for four thousand dollars (\$4,000.00), payable to “Treasurer of the United States,” to USDA, APHIS Field Servicing Office, Accounting Section, P.O. Box 3334, Minneapolis, Minnesota 55403, within 30 days from the effective date of this Order. The certified check or money order should include the docket number of

this proceeding.

This Decision and Order will become final and effective 35 days after service hereof, unless there is an appeal to the Judicial Officer within 30 days after service pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).)

[This Decision and Order became final and effective September 18, 2001.-  
Editor]